

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

MEMORANDUM FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals
for the District of Columbia Circuit

NO. 22,058

FILED AUG 19 1968

Nathan J. Paulson
CLERK

ROBERT WILSON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOSEPH S. McCARTHY
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Rockville, Maryland

ATTORNEY FOR APPELLANT

August 7, 1968

MEMORANDUM FOR APPELLANT

Appellant was convicted for violations of Title 22, Sec. 2901, 501, D. C. Code (1967 ed) (robbery, assault with a dangerous weapon). He was tried and convicted before the United States District Court for the District of Columbia without a jury on counts 5, 6, 7, 8, and 9 of the indictment.

On appeal, the case was remanded to the trial judge for more extensive post-trial findings on the question of whether the appellant's loss of memory did in fact deprive the appellant of the fair trial and effective assistance of counsel to which the Fifth and Sixth Amendments entitle him.

The entire background and extended history of this case is fully presented in the briefs and the opinion in the prior appeal No. 20,887, Wilson v. United States, _____ U.S.App. D. C. (1968).^{1/} Appellant hereby adopts and relies upon the brief for appellant filed in the prior appeal.

On the date of May 3, 1968, the trial judge held a hearing pursuant to this court's directions on remand.

^{1/} In this Memorandum, "T.Tr." refers to the transcript of the trial and "H.Tr.R." to the complete 24 page transcript of the remand hearing held by Judge McGarraghy on May 3, 1968. The memorandum makes no reference to the other three transcripts in the record of the prior appeal -- the first competency hearing on June 22, 1965, the incomplete 29 page transcript of the second competency hearing, and the complete 34 page transcript of the second competency hearing on September 27 and 28, 1966.

At that hearing, appellant's counsel testified as to the ability of the appellant to aid in the preparation of his defense and the conduct of the trial.^{2/}

On May 16, 1968, Judge McGarraghy filed a Memorandum of Hearing Pursuant to Remand finding that the appellant did receive a fair trial under the applicable principles of due process and that the conviction should stand. An appeal was noted from the Memorandum of Hearing on Remand on May 27, 1968.

ARGUMENT

The trial judge was directed to consider, in assessing the effect of the amnesia on the fairness of the trial, the six following factors:

- (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
- (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

^{2/} Appellant waived the attorney-client privilege (H.Tr. R. 3).

- (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
- (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

At the outset of the hearing on remand, the Government again reiterated the stipulation that appellant suffers from a permanent retrograde amnesia as a result of which he had and continues to have no recollection of any of the events alleged in the indictment (H.Tr.R. 2-3) (T.Tr.5).

The first factor was "the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer". Counsel for the appellant testified that the appellant couldn't help him in any respect. (H.Tr.R.8). Nor could appellant aid in cross-examination; or by exposure to the witnesses and their testimony during the trial recall anything that had transpired on the afternoon and evening of October 2, 1964. (H.Tr.R.7, 9). As Judge McGarraghy states in his memorandum on remand, "His (appellant's) lack of knowledge is directly attributed to and a consequence of his amnesia". (Memorandum of Hearing Pursuant to Remand, p.2, hereafter

referred to as "Memorandum".) It is obvious that "the extent to which the amnesia affected the defedant's ability to consult with and assist his lawyer" was almost totally impaired. The only possible assistance that could have been given to the defense counsel was the identification of relatives and friends by the appellant that may have shed some light on the events described in the indictment. But, despite the fact that "... (D)efense counsel made extensive inquiries of relatives of the defendant who had been identified to counsel by the defendant in an effort to reconstruct the facts" (Memorandum, p.2), such inquiries were utterly fruitless. (H.Tr.R.6, 8, 9).

Appellant, therefore, could not, either before, during or since the conclusion of his trial, "asssist his lawyer" in any effective manner. 3/

The second factor was "the extent to which the amnesia affected the defendant's ability to testify in his own behalf". The Government stipulated that appellant would not be able to testify as to what had occurred if he took the stand. (H.Tr.R.14). Judge McGarraghy concedes that defendant was completely incapable of testifying in his own defense (Memorandum 2). But, the Judge

3/ See brief for appellant on prior appeal No. 20,887 at 17, 19-20 (hereafter cited as brief for appellant).

found "that had the defendant undertaken to establish an alibi it would have been a complete fabrication, and, therefore, as a matter of law, his inability to testify is insufficient to establish prejudice at trial" (Memorandum, p.2).

However, if the Government's case must be such "as to negate all reasonable hypotheses of innocence", then appellant's inability to testify as to "a reasonably possible alibi", considering the possibility that he may have gotten into the Fells' automobile during the time lapse between the car theft in which he is not positively identified (T.Tr.16, 17, 21- 22, 28), or after the robbery of the pharmacy where the identification was subject to certain inconsistencies (T.Tr.40-41, 56-57; H.Tr.R.9, 10-12, 14-16), could be sufficient to establish prejudice at trial. Certainly, "if there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so", would indicate a fundamental unfairness in holding that had appellant attempted to establish an alibi, it would have been a "complete fabrication" (Memorandum, p.2).

The third, fourth and fifth factors are related and somewhat interdependent upon one another. The evidence that could be extrinsically reconstructed is substantial. (Memorandum, p.3-4; brief for appellant 2-4, 11-13; brief for appellee 2-3).

The Government fully assisted the appellant and defense counsel in the reconstruction of the evidence. (H.Tr.R.6-7, 9-10, 12-13). However, although the evidence may be sufficient to sustain the conviction, it is not axiomatic that it be allowed to stand.

Two principal factors -- the failure of the Government to meet its burdens placed on it in this unique case and the lack of effective assistance of counsel due to appellant's amnesia -- result in a fundamental unfairness which should void the conviction.

First, the Government has failed to "negate all reasonable hypotheses of innocence" since a substantial question of positive identification remains. (H.Tr.R.14-18). Three witnesses testified as to identification of the appellant. The first, Mr. Fells, owner of the stolen automobile, was unable to make a positive identification. (T.Tr.10-17, 28). The second, an employee of the pharmacy, identified appellant as a participant in the robbery. (T.Tr.40-41). However, an inconsistency developed in this identification when the employee, Mr. Morse, testified that the shorter of the two men had a stocking over his face but one police report showed that the taller of the two, appellant, had a stocking over his face. (T.Tr.56-57, H.Tr.R.15-16, 23). The third witness was unable to identify either of the assailants. (T.Tr.65).


Second, it is difficult to comprehend how appellant could have exercised his right to the effective assistance of counsel under the Sixth Amendment. With a permanent and total lack of recollection of any of the events being described at trial, appellant cannot aid his counsel in defending him whether it be for purposes of cross-examination, impeachment or the providing of information which might assist counsel in his defense.

Thus, the possibility of a mistaken identification, coupled with a possible alibi defense in light of the remand opinion (which suggests that if there is any substantial possibility that appellant could, but for his amnesia, establish an alibi or other defense, it should be presumed that he could have) should vitiate the conviction below.

The sixth factor to be considered was "any other facts and circumstances which would indicate whether or not the defendant had a fair trial". Judge McGuire's refusal to approve a per se approach to the question of incompetency by reason of amnesia but to select a case by case determination of competency is perfectly legitimate. However, in this unique case where appellant's permanent amnesia is conceded by the Government, his incompetency to stand trial should be unquestioned. To require appellant to be tried and to uphold his conviction violates due process of law. Pate v. Robinson, 383 U.S. 375, 378 (1966).

Since the Government was unable to overcome the basic unfairness of trying a person in circumstances very similar to trying him in absentia, it follows that the conviction should be voided and the indictment dismissed.

Respectfully submitted,


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BRIEF FOR APPELLEE

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22,058

ROBERT WILSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FILED SEP 30 1968

FRANK Q. NEEKEK,
THEODORE WIESEMAN,
Assistant United States Attorneys.

Nathan Paulson
OFF. NO. 46-65

ISSUES PRESENTED

Whether the record shows a basis for the district judge's finding, pursuant to a remand from this Court, that there was no fundamental unfairness in a robbery trial of a defendant suffering from amnesia?

The instant appeal is from a ruling on remand pursuant to this Court's opinion in *Robert Wilson v. United States*, No. 20,887, decided January 18, 1968.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,058

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UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

All pertinent facts appear in this Court's opinion of January 18, 1968, in *Robert Wilson v. United States*, No. 20,887, and in the Memorandum filed on May 16, 1968, by Judge Joseph C. McGarraghy pursuant to this Court's remand in January.

ARGUMENT

The trial judge's finding on remand—that in all the circumstances of this case there was no fundamental unfairness in convicting an amnesiac defendant of robbery—is supported by the record.

The sole question on this second appeal from the robbery conviction of an amnesiac defendant is whether Judge McGarraghy's finding on remand of no fundamental unfairness in the circumstances surrounding the conviction finds support in the record. This Court directed Judge McGarraghy to make detailed written findings and to consider six separate factors in reaching a judgment whether the conviction was consistent with standards of due process. Judge McGarraghy's Memorandum dated May 15, 1968, considered each of the six factors in detail and explained why the record compelled a finding that the conviction must stand. We cannot justify burdening the Court by repeating in our brief the discussion already appearing in Judge McGarraghy's Memorandum. Accordingly, we will not discuss the six factors individually. We place our reliance on the detailed discussion of the six factors in Judge McGarraghy's Memorandum, which speaks for itself, and a few observations appearing in the paragraphs below.

In our view, the record clearly supports Judge McGarraghy's weighing of the six factors and his ultimate conclusion. Indeed, it is difficult to perceive any reasonable basis in the record for a different conclusion. To be sure, a defendant suffering from amnesia confronts problems not faced by other defendants. But this Court made it clear that lack of memory *per se* was not controlling. The question is whether in the circumstances of this case the defendant was so crippled by lack of memory as to make any trial a denial of due process. If that be the question, then Judge McGarraghy reached the only possible conclusion; for it is difficult to imagine an amnesia case with less prejudice to the defendant. The defendant had full access before trial to all the facts of the

case; he was fortunate to be represented by counsel distinguished both for his ability and his diligence; the crimes were committed publicly, not secretly, with no dispute as to *mens rea* or as to the manner in which they were committed; the amnesia did not begin until seven hours before the offenses, leaving the defendant with a memory of what he had been doing earlier in the day and what he intended to do that night; he knew relatives and associates who could have testified or given the names of likely witnesses to testify to an alibi defense if one existed; and the evidence of guilt was so overwhelming, particularly the proceeds of the robberies found in the wrecked car, as to preclude any notion that he was innocent.

The fifth factor enumerated by this Court was that the trial judge should determine whether the Government's case negated all reasonable hypotheses of innocence. Neither in the remand hearing below nor in the memorandum filed in this Court has the defendant been able to suggest any hypothesis of innocence, let alone a reasonable one. It is impossible to imagine how the defendant, who was identified as one of the robbers, came to be in the wreckage of the car with an associate of his and with the proceeds of the two offenses a very short time after the second robbery if he were not the second robber. Any possible theory transcends the bounds of the imaginations of reasonable men.

CONCLUSION

Therefore, it is respectfully submitted that the judgment of conviction should be affirmed.

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